IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 18, 2008 Session

STATE OF TENNESSEE v. JACKIE LYNN GRAY

Appeal from the Circuit Court for Marion County
No. 7681 J. Curtis Smith, Judge

No. M2007-02360-CCA-R3-CD - Filed June 26, 2008

A Marion County Circuit Court jury convicted the defendant, Jackie Lynn Gray, of two counts of driving under the influence (DUI) and speeding. The trial court merged the DUI convictions and imposed an effective sentence of 11 months and 29 days to be suspended upon the service of 20 days' incarceration. In this appeal, the defendant contends that the trial court erred by denying his motion to suppress the results of the breathalyser test and that the sentence of 20 days' incarceration is excessive. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

William C. Killian, Jasper, Tennessee, for the appellant, Jackie Lynn Gray.

Robert E. Cooper, Jr., Attorney General and Reporter; Andrew Hamilton Smith, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Sherry Shelton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Just after midnight on December 19, 2005, Kimball Police Department Officer Donnie Basham observed the defendant's red pick-up traveling 52 miles per hour in a 30-miles-per-hour speed zone. The officer activated his emergency equipment and stopped the defendant's vehicle. Upon approaching the defendant, the officer "smelled an odor of intoxicant coming from the vehicle." At that point, he asked the defendant "if he had been drinking," and the defendant "stated he drunk about six beers." Officer Basham had the defendant perform the nine-step walk and turn and the one-legged stand field sobriety tests. The officer reported that the defendant failed both tests by failing to follow the directions precisely and by failing to keep his balance during the tests. After also noting that the defendant had blood-shot eyes and slurred speech, the officer arrested him for driving under the influence and read to him the "Implied Consent Form." The defendant signed the form and indicated his willingness to submit to testing to determine his level of intoxication.

Officer Basham recalled that as he placed the defendant into custody, the defendant asked if he would be given a blood test and the officer said, "Yes." Officer Basham stated that "probably five seconds later I said, 'Well, I'm going to take you and have you blow on the intoximeter.'" He stated that the defendant was "[o]kay, at that time" with taking the breathalyser test. Officer Basham explained that, because of the time involved in procuring a blood sample at the emergency room, he preferred to have DUI suspects perform a breath test instead unless he "suspect[ed] a narcotic, be it legal narcotics or abused prescribed narcotics."

Officer Basham transported the defendant to the Marion County jail and, after observing the defendant for a period of 20 minutes, asked the defendant to blow into the intoximeter. After three tries, the defendant was able to provide a sample sufficient for testing. After receiving the results of the breath test, Officer Basham turned the defendant over for booking and returned to the Kimball Police Department to complete his paperwork for the arrest. A short time later, Officer Adam Blevins telephoned and told him that the defendant had requested a blood test. Officer Basham testified that he refused to transport the defendant to the emergency room for a blood test because "I'd offered him the intoximeter and he did do it. It was sufficient with my investigation and" it was close to the two-hour time limit for viable scientific blood alcohol testing.

Marion County Sheriff's Department Officer Adam Blevins was working as a correctional officer at the Marion County jail when Officer Basham arrived with the defendant to take the breathalyser test. Officer Blevins stated that the defendant "had an odor of alcohol about his person" and appeared to be "intoxicated." The officer recalled that "20 to 30" minutes after the defendant was placed "in the drunk tank" and Officer Basham had left the jail, the defendant "requested to go to Grandview Medical Center and have a blood test done." Because Officer Blevins was new, he telephoned Officer Basham with the request. Officer Basham told Officer Blevins that "the breahaly[s]er was sufficient, and . . . he was not required to take him to the hospital for a blood test." The defendant told Officer Blevins that he thought the blood test would be lower than the breath test.

Officer Tammy Smith, who administered the breathalyser test to the defendant, testified that the defendant blew three times before producing a sufficient sample. She also testified that she changed the plastic tip on the machine each time the defendant attempted the test. The third test produced a result of .13. Officer Smith recalled that the defendant smelled of alcohol and appeared to be under the influence. After Officer Basham left, the defendant "was fussing about wanting to . . . go to the hospital and have the blood drawn," so Officer Blevins called Officer Basham and asked if he would take the defendant to the hospital. Officer Basham refused. She allowed the defendant to make a telephone call, and he called his wife. He did not ask to make any other calls. Officer Smith agreed during cross-examination that the defendant "wasn't given any options to call Grandview, have a nurse come by or anything else."

The defendant offered no proof.

At the conclusion of the trial, the jury convicted the defendant of DUI by driving with a blood alcohol level greater than .08, DUI by driving while under the influence of alcohol, and speeding. The trial court merged the DUI convictions and, after a sentencing hearing, imposed an

effective sentence of 11 months and 29 days to be suspended after the service of 20 days' incarceration on consecutive weekends. In this appeal, the defendant contends that the trial court erred by denying his motion to suppress on due process grounds the results of the breathalyser test and that the imposition of 20 days' incarceration is excessive.

I. Motion to Suppress

Prior to trial, the defendant filed a motion to suppress the results of the breathalyser test on grounds that the denial of a blood test violated his due process rights. Specifically, he alleged that Officer Basham's refusal to transport him to the hospital for a blood test resulted in the suppression of potentially exculpatory evidence in violation of his right to due process. He reasserts this claim on appeal. The State submits that the officer was not required to provide the defendant with a second blood alcohol test and that, although the defendant is statutorily entitled to seek a second test at his own expense, Officer Basham was under no duty to transport the defendant for testing.

At the hearing on the motion to suppress, Officer Basham testified that after he was arrested, the defendant requested a blood test. Although the officer initially agreed to provide the blood test, "then probably five or six seconds later I explained to him I was going to take him for intoximeter and have him blow in the intoximeter and he said, 'Okay, I'll probably flunk it.'" He then transported the defendant to the jail, observed him for 20 minutes, and administered the breathalyser test with the help of Officer Smith. After Officer Basham returned to the Kimball Police Department, Officer Blevins called and reported that the defendant had asked to be taken to the hospital for a blood test. Officer Basham refused, commenting that he did not have to provide the defendant with more than one test and that it was nearing the two-hour time limit for viable scientific testing of blood alcohol.

Officer Blevins testified that after Officer Basham left and the defendant was placed in the "drunk tank," the defendant asked to be taken to the hospital for a blood test. Because Officer Blevins was new to the Sheriff's Department, he called Officer Basham to ask how he should proceed. Officer Blevins confirmed that Officer Basham refused to return to the jail and take the defendant for a blood test.

At the conclusion of the hearing, the trial court denied the defendant's motion, concluding "that it was not a denial of his due process right, and . . . that he waited too late, that he could not have had an effective blood test by . . . the time he even started making requests to do that." The trial court specifically found that the defendant made no attempts to procure a blood test on his own and was "just a defendant saying take me to the ER, I want a blood test."

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and this court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Odom*, 928 S.W.2d at 23; *see also* Tenn. R. App. P. 13(d). The

application of the law to the facts, however, is reviewed de novo on appeal. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998). We review the issue in the present appeal with these standards in mind.

A person who submits to blood alcohol testing by the police is statutorily entitled "to have an additional sample of blood or urine procured and the resulting test performed by any medical laboratory of that person's own choosing and at that person's own expense." T.C.A. § 55-10-410(e) (2006). In addition, apart from section 55-10-410(e), a defendant's "due process rights [are] violated when the police interfere[] with the [d]efendant's attempt" to obtain independent blood alcohol testing. *State v. Livesay*, 941 S.W.2d 63, 66 (Tenn. Crim. App. 1996). This is because "'[t]he denial of an opportunity to procure a blood test on a charge of intoxication prevents the accused from obtaining evidence necessary to his defense.'" *Id.* (citation omitted). An accused's right to independent blood alcohol testing does not, however, place upon the police "an affirmative duty to make a blood test available to the defendant by transporting him from the place of his incarceration to a hospital for the requested test." *State v. Choate*, 667 S.W.2d 111, 113 (Tenn. Crim. App. 1983). Moreover, "there is no duty or obligation on law enforcement officers to administer a blood test," as long as they do not "frustrate the reasonable efforts of an accused to obtain a timely sample of his blood." *Livesay*, 941 S.W.2d at 66 (citation and internal quotation marks omitted).

In this case, the defendant requested a blood test after submitting to the breathalyser test but made no attempt to procure the test other than to "raise Cain" in the drunk tank. Although Officer Basham refused to transport the defendant to the emergency room for a blood test, he was under no duty to do so, and, as a result, his refusal does not amount to a denial of the defendant's due process rights. *See Choate*, 667 S.W.2d at 113. There is no evidence in the record that either Officer Basham or Officer Blevins hampered or obstructed any effort by the defendant to obtain a blood test. The record establishes that the defendant made no efforts to secure independent blood testing. He used his telephone call to contact his wife, and there was no proof that he asked her to assist in having a medical professional come to the jail to draw his blood. Because the defendant made no efforts to procure testing and because there is simply no proof that the officers did anything to prevent him from exercising his right to have an independent test, there was no deprivation of his due process rights. The judgment of the trial court denying the motion to suppress is affirmed.

II. Sentencing

The defendant contends that the order of 20 days' incarceration violated the requirements of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). The State asserts that the defendant waived any challenge to the sentence under *Blakely* by failing to raise the issue in the trial court. Alternatively, the State contends that because the defendant was sentenced under the *Blakely*-compliant amendments to the Sentencing Act, the sentence does not violate the defendant's Sixth Amendment rights. Finally, the State submits that enhancement on the basis of prior criminal convictions is permissible under *Blakely*. We agree with the State on all points.

Initially, the defendant did not raise any *Blakely*-related objection to his sentence in the trial court. The defendant's failure to raise the *Blakely* issue prior to appeal deprives him of

plenary review; however, this court may consider plain error upon the record under Rule 52(b) of the Tennessee Rules of Criminal Procedure. *State v. Ogle*, 666 S.W.2d 58, 60 (Tenn. 1984). Before an error may be so recognized, however, it "must be 'plain' and it must affect a 'substantial right' of the accused." *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). The word "plain" is synonymous with "clear" or equivalently "obvious." *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). In *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000), our supreme court adopted *Adkisson*'s five factor test for determining whether an error should be recognized plain:

> (a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is "necessary to do substantial justice."

Smith, 24 S.W.3d at 282 (quoting *Adkisson*, 899 S.W.2d at 641-42). "[A]ll five factors must be established by the record before [a reviewing court] will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* at 283.

Because the record evinces neither the breach of a clear and unequivocal rule of law nor a violation of the defendant's Sixth Amendment rights, review of the sentence under the plain error doctrine is unnecessary. First, as pointed out by the State, the defendant was sentenced under the 2005 amendments to the Sentencing Act, which made the application of the enhancement factors advisory in nature. *See* T.C.A. § 40-35-114 (2006); *see also State v. Troy Sollis*, No. W2007-00688-CCA-R3-CD (Tenn. Crim. App., Jackson, May 2, 2008). Second, because the defendant was sentenced for a misdemeanor, which has always involved discretionary application of the statutory enhancement factors, the holding in *Blakely* is inapplicable. *See State v. Jeffery D. Hostetter*, No. M2003-02839-CCA-R3-CD (Tenn. Crim. App., Nashville, Dec. 29, 2004) ("The Sixth Amendment concerns expressed in *Blakely* are not implicated by our misdemeanor sentencing scheme."). Finally, even if review of the sentence under *Blakely* was necessary, the record establishes that the trial court ordered the 20-day incarcerative sentence on the basis of the defendant's prior criminal convictions, which is completely permissible under *Blakely*. *See Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536.

Accordingly, the judgments of the trial court are affirmed.

_____

JAMES CURWOOD WITT, JR., JUDGE